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Supreme Court, U.S.
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ORIGINAL

NO 94-7743

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

FRED A. WHITAKER

PETITIONER

VS

SUPERIOR COURT OF CALIFORNIA

SAN FRANCISCO COUNTY

RESPONDENT

DISTRIBUTED

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MERRILL REESE, INC.
REAL PARTY IN INTEREST

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
UNITED STATES

BRIEF FOR PETITIONER
(FRED A. WHITAKER)
SUBMITTED IN OPPOSITION
TO DEFENDANT'S REPLY BRIEF
UNDER SUPREME COURT RULE#15

FRED A. WHITAKER IN PRO PER
872 69TH AVE.
OAKLAND, CA. 94621
510-569-1343.

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SUMMARY OF PETITIONER'S LEGAL POSITION

0.00 THE US SUPREME COURT HAS JURISDICTION OF THIS CASE: The Issuance of an extraordinary Writ under 28 USC 1651(a) is not a right but a discretionary right. An Writ of certiorari is a Discretionary Right (See Supreme court Rule 10 & Rule 20.1).

0.01. All Writs Act Provides Federal Court with those Writs necessary to preservation or excercise of its subject matter Jurisdiction ...etc See ITT Community Development Corp. V Barton, D.C.Fla. 1978 457 F.Supp.224; Harris V dept. of corrections, D.C.Okla.1977 426 F.Supp.224; US V Western Pa. Sand & Gravel ass'n D.C.Pa 1953 114 F.Supp. 158.

.02. Statutory power of reviewing courts to issue mandamus or other extraordinary writs carries with it the power to issue less strenuous relief. See Tokio Marine & fire Ins.Co. Ca 5 LA 1963 322 F.2d 113.

0.03. Defendants allegation that Petitioner had a legal right to appeal Judicial bias as cited by People V Brown 6 Cal 4th 324,334 was Inaccurate.

0.04. California's Supreme Court In People V Brown supra at 324,334 Ruled that judicial Bias brought under statutory claims (CCP# 170.1(6) & 170.6) is not reviewable by appeal but only by Writ of Mandate.

.05. Since petitioner filed only a statutory Judicial Bias claim by law he had no Right to Appeal Under Court Ruling In People V Brown Cited.

THE CASE DEFENDANT CITED PEOPLE V BROWN 6 CAL 4TH AT 324 WAS DISTINGUISHABLE FROM PETITIONER'S CASE:
In People V Brown An Independant Judge was allowed to rule upon another Judge's Disqualification whereas In my case No Independant

Judge was allowed to Rule upon The Motion to Disqualify Judge Cahill.

PETITIONER PROPERLY RAISED FEDERAL QUESTION IN PARAGRAPH 1.04 OF PETITIONER'S WRIT OF MANDATE.

.06 Petitioner never had an opportunity for an independant Judge To Review his Motion For Disqualification of Judge Cahill. The Writ of Mandate By Law (CCP# 170.3) In California's Court of Review was the appropriate judicial Process to First Raise Issue of Petitioner's Constitutional Legal Rights Being violated.

PETITIONER'S WRIT OF CERTIORARI IS CONSISTENT WITH THE PURPOSE OF A WRIT OF CERTIORARI BEFORE THIS COURT:

.07 Petitioner's Writ of Certiorari by Raising Legal issue that all Litigants have a Right at all judicial proceedings to be Free from Judicial Bias that outweigh A Customary Civil procedure that a judge hear All Motions for Reconsideration Promotes Consistency, Fairness, Harmony & Uniformity of The Law.

.08 The Supreme Court's Court order In Re Whitaker 115 S.Ct 2 1994 limiting Petitioner's Right To mandamus and prohibition is based on Court's Wrong Perception of legal facts and issues of case. In Whitaker V Lake Merrit Lodge Petitioner Sought \$40 Million In UnConstitutional taxes not \$3.00. Petitioner Complaint Under Business & Professional Code 17200 was on behalf of Himself and General Public Sought restitution for (A) Illegal Tax from 1965 till 1990 and (B) Illegal Tax raise from 4% to 10% from 1978 till 1990. Petitioner obtained a default Judgement after a Summary Judgement was not answered by defendant. Court awarded Judgement For plaintiff yet Zero damages. BASIS OF APPEAL WAS THAT THE JUDGEMENT WAS IRRATIONAL AND ARBITRARY AND NOT SUPPORTED BY COURT RECORD. I.E. IF LAKE MERRITT LODGE CHARGED PUBLIC ILLEGAL TAXES FROM 1965 TILL 1990 HOW COULD COURT AWARD ZEROX DAMAGES?

.09 PETITIONER'S WRIT OF CERTIORARI IS RIPE FOR REVIEW:(A) The legal issues raised by Petitioner's Writ Of Certiorari California's Court of Review has refused to review those issues (B) The legal issues raised by Petitioner's Writ are of First Impression (C) The Judicial Process in The state of California has afforded Petitioner No oral Hearing nor a Written opinion for Petitioner's Writ of Mandate.Thus their is no expedited resolution of all disqualification challenges.

I

DEFENDANT'S SUMMARY OF PROCEEDINGS IS AN INACCURATE PICTURE OF THE JUDICIAL PROCEEDING

1.0 California's Law is not clear that Once any judge is unavailable (Removal for cause CCP# 170.1(6) or Peremptory Challenge (CCP#170.6)) A Judge cannot hear any Motion for reconsideration;See Micro/Vest Corp. V Superior Court 150 Cal.app.3d at 1085-1090;Zeller Electronics Lab CombH V Superior Court Supra 206 Cal.App.3d at 1222-1232;Muller V Tanner 2 Cal.App.3d at 445.

1.01 Petitioner had alleged in various moving papers in Lower Court of Law that defendant's Demurrer and Memorandum Of Points & Authorities had Violated The Law :(A) CCP# 435&436 -Making False & Misleading Statements (B) Penal Code 118 -Perjury- (C) Cal Rules of Court 5-200 Violating Attorney Ethics (D) CCP# 425.10 -Making False,Misleading statements concerning Material pleaded facts and (E) That Judge Cahill violated Local Rule#14 -Refusing to allow petitioner a right to present oral evidence at 7/14/94 Hearing.

1.02. Judge Cahill's Court Order on 7/27/94 sustained defendant's demurrer only Without dismissing any claim of Petitioner's and not

without leave to amend (Exhibit#9 Writ of Mandate) and Overuling One aspect of demurrer.

1.03. Petitioner on July 22,1994 filed and served upon all parties a Motion For Reconsideration set for 8/17/94 regarding the court ruling of 7/27/94.

1.04. Petitioner on 7/29/94 filed & served upon defendant and the Court's clerk Motions to disqualify Judge Cahill under CCP# 170.6 and or CCP# 170.1(6).

1.05. Judge Cahill Failed to Respond To Petitioner's Motion To Disqualify Him Under CCP# 170.1(6) within the 10 day limitation as required by Law Under CCP# 170.3(C)(4)(5).

1.06. Judge Cahill's 8/18/94 Court order struck Petitioner's CCP# 170.1(6) Motion on Grounds Court Had no Knowledge of proper service upon him.Under current law CCP# 170.4(A)(60 Judge Cahill had no legal authority to strike petitioner's Motion To disqualify Judge Cahill For cause.

II

RESPONSE TO DEFENDANT'S ALLEGATION OF INACCURACIES AND OMISSIONS IN MR. WHITAKER'S PETITION.

PETITIONER'S STATUTORY CLAIM UNDER CCP# 170.1(6) OR 170.6 AFFORD NO RIGHT TO APPEAL UNDER PEOPLE V BROWN 6 CAL 4TH AT 324,334.

2.0 Defendant claims that California's Supreme Ct In People V Brown 6 Cal 4th 332-334 held a litigant who is denied Due Process By a Judge's refusal to disqualify himself,the litigant may appeal that court Ruling after the final Judgement.

2.01. The Court In People V Brown supra at 324-334 stated that a Statutory claim under CCP# 170.1 is an none appealable order and may be reviewable only by a Writ of Mandate .

2.02. California's Supreme Ct In People V Brown Section CCP# 170.3(D)

does not apply and hence does not Bar review (on appeal from a final Judgement) of NonStatutory claims that a final Judgement is constitutionally invalid because of Judicial Bias.

2.03. Petitioner's Claims of Judicial Bias were statutory violations under CCP# 170.1(6) and 170.6. Thus Petitioner had no right to appeal as stated In People V Brown 6 Cal 4th 324(5a,5B)324 Regarding his statutory claim of judicial bias.

III

THE CASE DEFENDANT CITED PEOPLE V BROWN 6 CAL 4TH 324 IS DISTINGUISABLE FROM PETITIONER'S CASE BEFORE THIS COURT.

3.0 In People V Brown supra 330 the Legal Issue of whether Judge Mortland was disqualified was heard by an Independant Judge Timlin in April 1989.

3.01. Issue of Whether Judge Mortland had failed to file answer within 10 days of filing or service etc was never raised before Judge Timlin's review of The Motion To Disqualify Judge Mortland In the Lower Court of Law.

3.02. Defendant In People V Brown supra at 330 immediate challenged Judge Timlin's Court Order by a Petition For A Writ of mandate.

3.03. In Petitioner's case No Independant Judge reviewed petitioner's Motion of disqualification of Judge Cahill In The lower Court Nor Did any Independant Judge Rule upon the legal issue whether Judge Cahill had filed an answer within the Legal Time frame allowed by Law.

3.04. In Petitioner's case The Lower Court of Law failed To comply with The Law CCP# 170.3 In that Petitioner's Motion For Disqualification process created No Court record that an Independant Judge had Ruled upon Judge Cahill's Disqualification.

IV

PETITIONER'S WRIT OF CERTIORARI HAS CONSTITUTIONAL GROUNDS FOR REVIEW
4.0 Petitioner's Writ of Certiorari is clear to all parties involved.

Supreme Court Rule 17 other Jurisdiction mandates that A Writ must be filed In accordance under Supreme court 20.

4.01. The issuance of An ExtraOrdinary Writ Under USC 1651(A) is not a matter of right but of Court's Discretion.. whereby adequate relief cannot be obtained in any other form or from any other Court under Supreme Court rule 20.1.

4.02. Petitioner contents that 28 USC 1651(A) under Supreme Court 20.1 includes Writ of Certiorari and Does Not excludes them.

V

PETITIONER PROPERLY ASSERTED HIS FEDERAL CONSTITUTIONAL CLAIMS AT COURT OF REVIEW, CALIFORNIA'S SUPREME COURT AND BEFORE THIS COURT.

5.0 Petitioner In ~~the~~ Writ of Mandate Paragraph 1.04 Identified that His Due Process & Equal protection Rights were denied. Petitioner In His Writ of Mandate Exhibit#3 Indicated that The Lower Court Judge engaged In (A) Judicial Misconduct (B) Failed To Act Impartially (C) Prejudicial Acts (D) Adopted a posture of Hostility To The Law or a party.

5.01. The Law under CCP# 170.3(D) mandates that Question of the disqualification be reviewable By Writ of Mandate.

5.02. Thus by Law The Court of Review would be the lowest Court whereby the issues of Petitioner's Rights being Violated which include my Constitutional Legal Rights. In my Writ of Mandate I raised Constitutional Violations to my Legal Rights In paragraph 1.04 of My Writ of Mandate.

5.03. In this case The Lower Court of Law's Failure to have An Independant Judge review whether Judge Cahill was Disqualified was a

Violation of Petitioner's Constitutional Legal Rights. This was stated in paragraph 1.04 of petitioner's Writ of Mandate.

VI
PETITIONER'S WRIT OF CERTIORARI HAS BEEN APPROPRIATELY BROUGHT BEFORE THIS JUDICIAL BODY

6.0 The Purpose of accepting any Writ of Certiorari is To promote Consistency, Uniformity, Harmony & Fairness In The Application of the Law.

6.01. Established law is that A Judicial process by a Judge who is not Fair or impartial constitutes structural defect In the constitution of the Judicial mechanism and resulting Judgement is reverisable error per say. See Arizona V Fulminante 499 US 279; Gomez V United States 490 US 858; Gray V Mississippi 481 US 648; Rose V Clark 478 US 570; Tummy V Ohio 273 US 510.

6.02. California's Judicial process has Codified petitioner's right to be Free from Judicial Bias under CCP# 170.6 & 170.1(6) and other Code of Civil procedure: (A) CCP#170.3(C)(3) mandates that within 10 days after filing or service whichevery is later ... a judge may file a written verified answer (B) CCP# 170.3(C)(4) Mandates that a judge who fails to file a consent or answer within time allowed as specified in (a) shall be deemed to their own disqualification (C) CCP#170.3(C)(5) mandates that no Judge who refuses to recuse themselves shall pass upon their own disqualification or upon the sufficiency in law, fact or otherwise the stateement of disqualification. In every such case the question of disqualification shall be heard and determined by another Judge agreed upon by all parties (D) CCP#170.3(C)(6) mandates that the Judge deciding the question of disqualification may decide the question on the basis of

the statement of disqualification ... etc.

6.03. Judge Cahill In The Lower court of law violated The Structure Judicial Bias Rights of Petitioner By: (A) Filing to answer Petitioner's Written statement of disqualification within 10 days as required by CCP#170.3(C)(3): (B) Judge Cahill's Failure to file answer to disqualification within legal time limit violated CCP# 170.3(C)(4) (C) Judge Cahill Ruled upon his own disqualification and failed to have another Judge agreed upon by all parties Rule upon his disqualification a violation of CCP#170.3(C)(5)

6.04. The determination of the question of the Disqualification of any Judge Under CCP170.3(D) is not an appealable order but Reviewed only by Writ of mandate.

6.05. In The State of California Writ of Mandate Process Mandates that The reviewing Court To Compel the performance Of An Act which The Law Specially enjoins.

6.07. In This case Petitioner had a vested Legal Right that The Lower Court of Law Judge Cahill abide by The Structure Judicial Bias Law (CCP#170.3(C)(3)(4)(5)).

6.08. CCP#170.3(D) Mandates that The determination of a Judge's Disqualification is Reviewable By A Writ of Mandate.

6.09 Petitioner's Writ of Certiorari Raises Important Legal issues : (A) Court of Law Failure To Comply with Structure Judicial Bias (CCP# 170.3(C)(3)(4)(5) Violates Petitioner's Constitutional Legal Rights (B) California's Court of Review's Writ of Mandates failure To Determine The Appropriate Law and Whether Lower Court of Law complied with the Law violates principle In Edler V Holloway Violates Petitioner's Right To A fair Trial (C) That When any Judge

Discounts/Disregards Evidence/facts and the Law without Legal Justification Is Judicial Basis.

6.10 The Purpose of Statutory Judicial Bias is to Promote Judicial Economy By forcing Expedited resolution of all disqualification challenges (See People V Brown 6 cal 4th at 333.

6.11 For California's Court of Review To allow any Lower Court judge To deliberately violate The Law and not To File A Writ of mandate to compel performance of an Act which the law specially enjoined (CCP# 170.3(C)(3)(4)(5) Denies Petitioner A Right To A fair trial.

PETITIONER'S WRIT OF CERTIORARI RAISES AN ISSUE OF FIRST IMPRESSION:WHETHER A LOWER COURT OF LAW JUDGE WHO ENGAGES IN DISCOUNTS/DISREGARDS FACTS/EVIDENCE/LAW WITHOUT ANY LEGAL BASIS CONSTITUTES AN ACT OF JUDICIAL BASIS.

6.12 In United states of America V Mark R. Hanna 95 Daily Journal DAR 3143 Court Ruled that by imposing a sentence that was based on materially false and unreliable information,VIZ,the Unsupported and uncorroborated allegations of Hanna's Co-defendant ,Ronald bennett was unConstitutional.

6.13 The United States Court of Appeals for The Ninth Circuit D.C. CR 90-01335 -JGD In Haroutinovn Ghokassian V Donna & Shalala Court ruled that when a judge Discounted/Disregarded Evidence In a Judicial process that was UnConstitutional.

DEFENDANT'S CASE LAW CASES(BUCHANAN V BUCHANAN 99 CAL.APP.3D 587;CALIFORNIA FED.SAV. & LOAN ASSN. V SUPERIOR COURT 189 CAL.APP.3D 267,270-271;MCCARTNEY V SUPERIOR COURT 223 CAL.APP.3D 1334,1340) BROUGHT BY RESPONDENT BEFORE THIS COURT WERE ALL INAPPROPRIATE FOR ISSUES RAISED BY RESPONDENT.

6.14 In Buchanan V Buchanan 99 Cal.App.3d at 587 Court Ruled that a CCP# 170.6 Motion Challenge that the hearing on a pretrial motion does not conclude until after the Reconsideration Motion if Any.

6.15 In Petitioner's case Petitioner Brought Both Peremptory Motion

Under CCP# 170.6 & A Motion For Cause Under CCP# 170.1(6) Prior To A Motion For Reconsideration.Thus Buchanan V Buchanan was not Controloing.

6.15 The court In California Fed.Sav. & Loan Assn. V Superior Court at 189 Cal.App.3d at 267 Ruled that The Peremptory challenge was considered Untimely under CCP# 170.6 because The Motion was brought after Summary Adjudication of issues and during the Class recertification process involved complex issues of law that had been decided thus the 170.6 peremptory challenge was denied.

6.16 The Court In California Fed.Sav. & loan Assn V Superior Court Supra at 271 Had not determined that Peremptory Challenge before a pretrial Motion was illegal but that It was untimely.

6.17 In Petitioner's case no Issues of Law had been decided as a matter of law and Petitioner had brought Peremptory and a Motion For causes Disqualification Prior to A Motion For Disqualification which wasn't The case In California Fed.Sav. & Loan Assn V Superior Court Supra at 271.

6.18 The Court In MCCartney V Superior Ct 223 Cal.App.3d at 1340 Ruled that Under CCP# 170.3 Written verified statement setting forth grounds for disqualification must be served on each party and the judge or clerk.The Court also Ruled that Under CCP# 170.4 if a statement for disqualification on it's face discloses no legal grounds for disqualification the trial Judge against whom it was filed may order it striken.In MCCartney V Superior Ct supra the Court ruled that the statement that Commissioner Zakon is a graudate of defendant's USC is not a legal ground for disqualification.

6.19. In Petitioner's case The Lower Court judge filed no response within the legal time limit as required by Law (CCP# 170.3(C)(3)(4).

6.20 In Micro/vest Corp. v Superior Ct 150 Cal.app.3d supra 1085 Court ruled that A Judge challenged for cause may not Rule on threshold questions such as timeliness or sufficiency of the statement of prejudice.

6.20 In petitioner's case the lower court judge ruled upon the timeliness and the sufficiency of the statement of prejudice.

THE THREE CASES CITED BY RESPONDENT HAS NOT ESTABLISHED THAT PETITIONER HAD NO LEGAL RIGHT TO REMOVE A JUDGE FOR JUDICIAL BIAS PRIOR TO A MOTION FOR RECONSIDERATION AFTER FILING PEREMPTORY AND MOTION FOR CAUSE.

6.21 The Lower Court Judge Cahill's Striking Petitioner's Motion For Cause and Allowing Petitioner's Peremptory Challenge only after his decision In A Motion For Disqualification were Final Judgements.

6.22. Petitioner's Legal position is that any Judge has a legal right to preside at any legal proceeding until such time he has not engaged In Judicial Bias or Procedures that allow for their removal .

6.23 For any Judge to make any court ruling after issue of their Judicial Bias has been resolved by Proper Civil Procedures of Law creates a "Structural" defect in the constitution of the trial mechanism.

I Fred A. Whitaker declare that the above statements are true and correct under the penalty of Perjury executed In Oakland,California on March 18, 1995.

March 18, 1995

Fred A. Whitaker

Fred A. Whitaker
(117)

1 PROOF OF SERVICE BY MAIL
2 UNDER CCP# 2015.5

3 I DECLARE THAT I FRED A. WHITAKER AM A CITIZEN OF THE UNITED
4 STATES AND LIVE IN OAKLAND CALIFORNIA; AND THAT I AM OVER THE
5 AGE OF 18 YEARS OLD AND THAT I AM PARTY TO THIS LEGAL
,CALIFORNIA 94621.

6
7 THAT ON 3/21/95 I SERVED A TRUE COPY OF THE ORIGINAL
8 DOCUMENT ENTITLED: PETITIONER'S OPPOSITION
9 TO DEFENDANT'S REPLY BRIEF

10
11
12
13
14 BY PERSONALLY DELIVERING THOSE DOCUMENTS TO THE FOLLOWING
15 ADDRESS:

16 Douglas A. Applegate
17 Bay, Ziegler, Anderson
18 & Parker
19 Four Embarcadero Center
20 14711Floor
21 SF, CA. 94111
22 Judge Corrille
23 SF Superior Court
24 633 Folsom St
25 SF, CA.

26 Supreme Court
27 303 2nd St
28 27th Floor
29 SF, CA.
30 Court of Appeals
31 303 2nd St
32 6th Floor
33 SF, CA.

34 I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
35 AND CORRECT , EXECUTED ON 3/21/95 IN OAKLAND, CALIFORNIA

36 DATE: 3/21/95

Fred A. Whitaker

27

28